[redacted]

No. 135

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

FLOYD E. KIDD,

Petitioner,

VS.

MERCK & COMPANY, INC.,

Respondent

APPENDIX TO BRIEF OF APPELLANT
IN COURT BELOW - 1a - 21a

APPENDIX TO BRIEF OF APPELLEE
IN COURT BELOW - 1b - 9b

No. 1025

No. 12918

MAY 1957
JOHN T. FEY, Clerk

United States Court of Appeals

For the Sixth Circuit

MERCK & COMPANY, INC.,

Appellant,

v.

FLOYD E. KIDD,

Appellee.

Appeal from the United States District Court for the Eastern District of Tennessee, Northern Division

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APPENDIX TO BRIEF OF APPELLANT

HAYWARD H. COBURN,
JOSEPH A. McAFEE,
ERNEST L. NAGY,
Counsel for Appellant.

Of Counsel:
EGERTON, McAFEE, ARMISTEAD & DAVIS,
312 Park National Bank Bldg.,
Knoxville, Tennessee,
DRINKER, BIDDLE & REATH,
117 South 17th Street,
Philadelphia 3, Pennsylvania.

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut St., Cincinnati, O.

FILED
AUG 2 - 1956
CARL W. REUSS, Clerk

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LIST OF RELEVANT DOCKET ENTRIES

Jan. 26, 1955 — Complaint filed.

Mar. 9, 1955 — Answer of defendant, filed. Copies served by Atty.

Nov. 14, 1955 — Order allowing substitution of complaint.

Nov. 14, 1955 — Amended complaint, filed.

Nov. 15, 1955 — Order of jury trial — all plaintiff's evidence heard and at close of same defendant moved for a directed verdict in its favor which was overruled; all defendant's evidence and at close of same defendant renewed its motion for a directed verdict which was overruled; thereupon jury heard argument of counsel, and respited to Nov. 16, 1955, at 9 A. M.

Nov. 16, 1955 — Order of Jury Trial continued — charge of the Court and verdict for plaintiff in amount of $12,000.00.

Nov. 18, 1955 — Final Judgment of $12,000.00 in favor of plaintiff and costs, execution awarded but issuance is stayed.

Nov. 22, 1955 — Defendant's motion for judgment notwithstanding verdict joined with its motion for a new trial, filed.

Jan. 12, 1956 — Transcript of testimony of defendant's motion for directed verdict, filed.

Jan. 12, 1956 — Transcript of Court's charge, Nov. 16, 1955, filed.

Feb. 17, 1956 — Motion for judgment or for a new trial heard by the Court and taken under advisement.

Mar. 19, 1956 — Order overruling defendant's motion for judgment N. O. V. and its motion for a new trial.

April 5, 1956 — Notice of Appeal, filed.

May 3, 1956 — Transcript of testimony of November 15 & 16, 1955, filed.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

CIVIL ACTION NO. 2587

FLOYD E. KIDD,

Plaintiff,

v.

MERCK & COMPANY, INC.

Defendant.

COMPLAINT

(Filed January 26, 1955)

Comes the plaintiff, Floyd E. Kidd, and sues the defendant, Merck & Company, Inc., for damages in the sum of $50,000.00, and for his cause of action, says:

First Count

1. Plaintiff is a citizen and resident of the State of Tennessee, residing in Knox County, and the defendant is a foreign corporation organized and existing under the laws of the State of New Jersey. It is qualified to do and is doing business in the State of Tennessee, and its agent for the service of process in the State of Tennessee is The Corporation Company, Hamilton National Bank Building, Knoxville, Tennessee. The matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs. The jurisdiction of this Court depends upon the diversity of citizenship between the parties, and the amount in controversy.

2. The defendant, Merck & Company, Inc., among its many other activities, collects human blood from profes-

sional donors, processes it in various forms, places it on the market, and sells it for a profit through the various channels of the trade. Among its many customers throughout the world is the Sisters of Mercy of Nashville, Tennessee, Inc., doing business as St. Mary's Memorial Hospital, located in Knoxville, Tennessee. One of the defendant's products bears the trade name, "Lyovac Normal Human Plasma (Irradiated)", and the defendant processes, packages and sells the same in interstate commerce and within the State of Tennessee to be administered intravenously to injured persons as a substitute for whole blood, especially in cases of shock and hemorrhage, for the purpose of restoration and maintenance of body proteins, and for the purpose of reestablishing blood volume following hemorrhage.

3. The said plasma is supplied by the defendant manufacturer in a sealed package containing one bottle, with a vacuum-tight closure, of pooled original plasma in dry form which is restored to full volume prior to administration by adding an equal amount of diluent (citric acid solution) contained, in an accompanying bottle, both bottles being equipped with outer aluminum closures, and both being packaged together in the sealed package referred to which is so constructed that its contents reach the patient without possibility of alteration by intermediate parties. Not only is the said plasma so packaged as to eliminate any possibility of alteration, but the method of distribution and storage is such that no reasonable opportunity for substitution of or for tampering with the sealed package is afforded third parties in the interim between the defendant manufacturer's physical control of the plasma and its administration to the patient.

4. On or about March 8, 1954, the plaintiff was admitted as a patient to St. Mary's Memorial Hospital, suffering from the loss of blood due to a leg wound, and for the aforesaid

purposes was administered intravenously by agents and employees of said hospital "Lyovac Normal Human Plasma (Irradiated)", which had been processed, packaged and sold for the aforesaid purposes by the defendant to St. Mary's Memorial Hospital and in turn sold for those purposes by St. Mary's Memorial Hospital to the plaintiff.

5. The said plasma, which had been processed, packaged and distributed by the defendant as aforesaid contained a filthy, inherently dangerous and sometimes deadly substance known as serum hepatitis (SH) virus when it was sold by defendant to St. Mary's Memorial Hospital. The defendant failed to use due care and was negligent in one or more steps in the collection, processing or packaging of said plasma so as to cause or permit it to contain the said virus. The particulars of the defendant's negligence and failure to use due care are known to or are accessible to the defendant, and are unknown to and are inaccessible to the plaintiff.

6. The defendant was negligent, apart from its negligence in the collection, processing or packaging of said plasma, in that it placed the same on the market for the purposes aforesaid knowing that it might contain said filthy and inherently dangerous substance, and knowing that the plaintiff and others similarly situated probably would not know that it might contain said substance. The plaintiff in fact did not know that said plasma might contain said filthy and inherently dangerous substance prior to or at the time the plasma was administered to him and said plasma did in fact contain said substance.

7. About two months after being administered said plasma, and as the direct result thereof, the plaintiff developed a very serious liver disease known as yellow jaundice, transfusion jaundice or serum hepatitis. The disease was caused by the presence of the said SH virus in the said plasma. As a result thereof the plaintiff suffered much pain, nausea, and discomfort, was bedfast for a long period of,

time, and was required to incur substantial medical and hospital bills in an effort to be cured of the disease. He lost substantial sums of money by reason of his inability to work, and he charges that his capacity for work and labor and for the enjoyment of life has been permanently impaired. Many important functions of the liver have been greatly impaired and the liver reserve depleted. He is subject to recurrences of the disease in acute stages accompanied by further pain, anxiety, nausea, and monetary losses. The original disease, as well as relapses, often results in death. The plaintiff is faced with this ever present possibility throughout his uncertain future, and as a result thereof he suffers constant fear and apprehension.

Second Count

8. Plaintiff adopts herein by reference paragraphs 1, 2, 4 and 7 of the preceding first count, and further avers that said plasma, which had been processed, packaged and distributed by the defendant as aforesaid, contained a filthy, inherently dangerous and sometimes deadly substance known as serum hepatitis virus when it was sold by defendant to St. Mary's Memorial Hospital, and in turn sold by St. Mary's Memorial Hospital to the plaintiff.

9. In marketing said plasma as aforesaid the defendant impliedly warranted that it was of merchantable quality and that it was fit for the aforesaid purposes, when in fact it was not of merchantable quality and was unfit and dangerous to the life and health of the plaintiff. In marketing said plasma as aforesaid the defendant violated, among other sections, the following section of the Code of Tennessee:

> "7208. **Implied Warranties of Quality.** — Subject to the provisions of this article and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of

goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be fit for such purposes.

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality * * *."

Third Count

10. The plaintiff adopts herein by reference paragraphs 1, 2, 4, 7 and 8 of the preceding first and second counts, and further avers that the defendant was negligent in the premises, which negligence proximately resulted in the plaintiff's contraction of the said liver disease with the said losses and damages resulting to him, in that the defendant, in the marketing of said plasma which contained a filthy, inherently dangerous and sometimes deadly substance, to-wit: the virus of serum hepatitis, violated the following sections of the Supplement to the Code of Tennessee, the same being a part of the Tennessee Food, Drug and Cosmetic Act:

"6580.3 **Prohibited Acts.** — The following acts and the causing thereof within the State of Tennessee are prohibited:

"(a) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded * * *."

"6580.15 **Drugs or Devices Deemed Adulterated.** — A drug or device shall be deemed to be adulterated:

"(a) (1) If it consists in whole or in part of any filthy, putrid, or decomposed substance; * * *".

Fourth Count

11. The plaintiff adopts herein by reference paragraph 10 of the preceding Third Count; including all of the material therein adopted except the quoted sections from the Supplement to the Code of Tennessee, and in lieu of said sections charges that the defendant was guilty of proximate negligence in the manner stated and with the results stated in that it violated the following sections of Title 21, United States Code (being a part of the Federal Food, Drug, and Cosmetic Act:

"331. **Prohibited Acts**

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded. * * *."

"351. **Adulterated Drugs and Devices**

A drug or device shall be deemed to be adulterated —

Poisonous, insanitary, etc., ingredients

(a) (1) If it consists in whole or in part of any filthy, putrid, or decomposed substance; * * *."

Plaintiff therefore avers that a cause of action has accrued to him under each of the foregoing four counts of his complaint, and hence he sues the defendant for the aforesaid sum of $50,000.00, and demands a jury to try the cause.

FRANK H. MARSH, JR.,
Attorney for Plaintiff,
Hamilton National Bank Building,
Knoxville, Tennessee.

POORE, COX, BAKER & McAULEY,
301 Fidelity Bankers Trust Bldg.,
Knoxville, Tennessee.
Of Counsel

BOND

We acknowledge ourselves sureties for costs up to the sum of $250.00.

This January 25, 1955.

FRANK H. MARSH, JR.
BEN F. McAULEY.

ANSWER

(Filed March 9, 1955).

Comes the defendant Merck & Co., Inc., and for answer to the complaint filed against it in this cause, says:

1. The allegations of Paragraph 1 of the complaint with reference to the citizenship and residence of the respective parties are admitted, but it is denied that defendant is liable to plaintiff in any amount.

2. The allegations of Paragraph 2 of the complaint are admitted except as to those allegations undertaking to explain the purposes and use of the blood plasma, and as to these allegations, defendant would show that its plasma has various uses, the necessity and occasions for which use or uses will depend upon many circumstances.

3. The allegations of Paragraph 3 of the complaint are admitted except as to the allegation that said plasma is so packed, bottled and sealed as to eliminate any possibility of alteration between the time the plasma is packed and sealed and its administration to the patient. After the plasma leaves the possession and control of the manufacturer it is always subject to alterations and contamination if improperly handled or used while in the possession of others, and special attention and caution is called to this and other haz-

ards in the instructions accompanying the plasma, and for these reasons said allegations are denied.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the complaint and for this reason said allegations are denied.

5. and 6. Defendant denies the allegations contained in Paragraphs 5 and 6 of the complaint. The defendant would show that in the use of whole blood, blood plasma and other similar substances for transfusion purposes there is always the possibility of the presence of a virus capable of producing serum hepatitis and this fact is known and recognized by all of the doctors and leading medical authorities throughout the country. Despite careful processing of blood and blood plasma there is still the possibility that the finished plasma may contain the hepatitis virus since no method, non-injurious to the blood or blood plasma, is known which will in all cases destroy or inactivate the virus. Accordingly, the use of blood plasma involves a calculated risk that the patient may develop serum hepatitis. This calculated risk was well known to plaintiff's attending doctors and physicians and was assumed by them and by plaintiff. In the distribution of defendant's plasma these facts and this calculated risk are expressly called to the attention of all purchasers and users in the instructions and pamphlets which accompany each bottle of plasma and no warranties of any kind are ever made by the defendant in the distribution and sale of its blood plasma against the aforesaid possibilities.

7. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the complaint with reference to plaintiff's contracting or developing a serious liver disease known as yellow jaundice but it is specifically and emphatically denied that plaintiff contracted said seri-